

NO. 48387-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

EDWARD BABINE, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Melissa Hemstreet, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence to convict appellant of the charged offense.

2. This Court should exercise its discretion to deny appellate costs should the State substantially prevail on appeal.

Issues pertaining to assignments of error

1. Appellant was charged with possession of methamphetamine, and the jury instructions required the State to prove the possession occurred in the State of Washington. Where there was no evidence regarding appellant's location when he was arrested and found to be in possession, must his conviction be reversed and the charge dismissed for insufficient evidence?

2. Given the serious problems with the LFO system recognized by our Supreme Court in Blazina, should this Court exercise its discretion to deny cost bills filed in the cases of indigent appellants?

B. STATEMENT OF THE CASE

1. Procedural History

The Kitsap County Prosecuting Attorney charged appellant Edward Babine, Jr., with two counts of delivery of methamphetamine in May 2015 and one count of possession of methamphetamine in August

2015. CP 6-10. The case proceeded to jury trial before the Honorable Melissa Hemstreet, and the jury found Babine not guilty of the delivery charges but guilty of possession of methamphetamine. CP 70-71. The court imposed a standard range sentence of 90 days in jail, and Babine filed this timely appeal. CP 73, 85.

2. Substantive Facts

At trial, the State presented evidence that Robert Anderson, a confidential informant for Bremerton Police Officer Stephen Forbragd, conducted controlled buys of methamphetamine on May 12 and May 14, 2015. RP 47, 73. While Anderson reported that he was buying methamphetamine from Babine, police never heard any conversation arranging the buys, they didn't see what apartment Anderson went into to conduct the buys, and they didn't see what happened inside the building. RP 91, 101. The jury found Babine not guilty of delivering methamphetamine. CP 70.

The State also charged Babine with possession of methamphetamine at the time of his arrest on August 4, 2015. The State alleged in the amended information that this crime occurred in Kitsap County, Washington, and the to convict instruction required the State to prove that it occurred in the State of Washington. CP 9, 134. At trial, Babine admitted that he possessed methamphetamine when he was

arrested. RP 234. Forbragd testified that he arrested Babine on August 5, 2015, and retrieved a baggie of what was later confirmed to be methamphetamine from Babine's pocket. RP 80, 186. Describing the circumstances of the arrest, Forbragd said, "He was contacted by myself and other patrol officers when he was spotted by another officer at a location, and he was arrested on the probable cause from this case." RP 80.

C. ARGUMENT

1. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT BABINE'S CONVICTION.

In every criminal prosecution, the State must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

In this case, Babine was charged with possession of a controlled substance (methamphetamine). Under RCW 69.50.4013(1), “It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.” Methamphetamine is a controlled substance. RCW 69.50.206(d)(2). The jury was instructed as follows:

To convict the defendant of the crime of Possession of a Controlled Substance as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt—

- (1) That on or about August 4, 2015, the defendant possessed a controlled substance, to wit: Methamphetamine; and
- (2) That this act occurred in the State of Washington.

...

CP 134 (Instruction No. 16).

Thus, according to the statutes under which Babine was charged and the law of the case as set forth in the jury instructions, the State was required to prove beyond a reasonable doubt not only that Babine was in possession of methamphetamine when he was arrested but also that the possession occurred in the State of Washington. See Hickman, 135 Wn.2d at 105 (venue included in jury instruction becomes law of the case which

State must prove beyond a reasonable doubt). The State presented no evidence regarding the location of Babine's arrest, however. The officer who arrested Babine testified only that "[Babine] was contacted by myself and other patrol officers when he was spotted by another officer at a location, and he was arrested on the probable cause from this case." RP 80. Without further evidence, no reasonable jury could find beyond a reasonable doubt that the possession occurred in the State of Washington, and Babine's conviction must be dismissed.

2. THIS COURT SHOULD EXERCISE ITS DISCRETION
AND DECLINE TO IMPOSE APPELLATE COSTS.

The court entered an order of indigency finding that Babine was entitled to seek appellate review wholly at public expense, including appointed counsel, filing fees, costs of preparation of briefs, and costs of preparation of the verbatim report of proceedings. CP 97-98.

- a. The serious problems *Blazina* recognized apply equally to costs awarded on appeal, and this Court should exercise its discretion to deny cost bills filed in the cases of indigent appellants.

Our supreme court in Blazina recognized the "problematic consequences" legal financial obligations (LFOs) inflict on indigent criminal defendants. State v. Blazina, 182 Wn.2d 827, 836, 344 P.3d 680 (2015). LFOs accrue interest at a rate of 12 percent so that even persons "who pay[] \$25 per month toward their LFOs will owe the state more 10

years after conviction than they did when the LFOs were initially assessed.” Id. This, in turn, “means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs.” Id. “The court’s long-term involvement in defendants’ lives inhibits reentry” and “these reentry difficulties increase the chances of recidivism.” Id. (citing AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA’S NEW DEBTOR’S PRISONS, at 68-69 (2010), available at https://www.aclu.org/files/assets/InForAPenny_web.pdf; KATHERINE A. BECKETT, ALEXES M. HARRIS, & HEATHER EVANS, WASH. STATE MINORITY & JUSTICE COMM’N, THE ASSESSMENT AND CONSEQUENCES OF LEGAL FINANCIAL OBLIGATIONS IN WASHINGTON STATE, at 9-11, 21-22, 43, 68 (2008), available at http://www.courts.wa.gov/committee/pdf/2008LFO_report.pdf).

To confront these serious problems, our supreme court emphasized the importance of judicial discretion: “The trial court must decide to impose LFOs and must consider the defendant’s current or future ability to pay those LFOs based on the particular facts of the defendant’s case.” Blazina, 182 Wn.2d at 834. Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id.

The Blazina court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as problematic with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to move on with their lives in precisely the same ways the Blazina court identified.

Although Blazina applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene Blazina’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion that Blazina held was essential before including monetary obligations in the judgment and sentence.

Babine has been determined to qualify for indigent defense services on appeal. To require him to pay appellate costs without determining his financial circumstances would transform the thoughtful

and independent judiciary to which the Blazina court aspired into a perfunctory rubber stamp for the executive branch.

In addition, the prior rationale in State v. Blank, 131 Wn.2d 230, 930 P.2d 1213 (1997), has lost its footing in light of Blazina. The Blank court did not require inquiry into an indigent appellant's ability to pay at the time costs are imposed because ability to pay would be considered at the time the State attempted to collect the costs. Blank, 131 Wn.2d at 244, 246, 252-53. But this time-of-enforcement rationale does not account for Blazina's recognition that the accumulation of interest begins at the time costs are imposed, causing significant and enduring hardship. Blazina, 182 Wn.2d at 836; see also RCW 10.82.090(1) ("[F]inancial obligations imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments."). Moreover, indigent persons do not qualify for court-appointed counsel at the time the State seeks to collect costs. RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same); State v. Mahone, 98 Wn. App. 342, 346-47, 989 P.2d 583 (1999) (holding that because motion for remission of LFOs is not appealable as matter of right, "Mahone cannot receive counsel at public expense"). Expecting indigent defendants to shield themselves from the State's collection efforts or to petition for remission without the assistance of counsel is neither fair nor realistic.

The Blazina court also expressly rejected the State's ripeness claim that "the proper time to challenge the imposition of an LFO arises when the State seeks to collect." Blazina, 182 Wn.2d at 832, n.1. Blank's questionable foundation has been thoroughly undermined by the Blazina court's exposure of the stark and troubling reality of LFO enforcement in Washington.

Furthermore, the Blazina court instructed *all* courts to "look to the comment in GR 34 for guidance." Blazina, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The Blazina court also suggested, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs." Blazina, 182 Wn.2d at 839. This court receives orders of indigency "as a part of the record on review." RAP 15.2(e). "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) standard, requires this

court to “seriously question” an indigent appellant’s ability to pay costs assessed in an appellate cost bill. Blazina, 182 Wn.2d at 839.

This court has ample discretion to deny cost bills. RCW 10.73.160(1) states the “court of appeals . . . *may* require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Blank, too, acknowledged appellate courts have discretion to deny the State’s requests for costs. 131 Wn.2d at 252-53. Given the serious concerns recognized in Blazina, this court should soundly exercise its discretion by denying the State’s requests for appellate costs in appeals involving indigent appellants, barring reasonable efforts by the State to rebut the presumption of continued indigency. Babine respectfully requests that this court deny a cost bill in this case should the State substantially prevail on appeal.

- b. Alternatively, this court should remand for superior court fact-finding to determine Babine’s ability to pay.

In the event this court is inclined to impose appellate costs on Babine should the State substantially prevail on appeal, he requests remand for a fair pre-imposition fact-finding hearing at which he can present evidence of his inability to pay. Consideration of ability to pay before imposition would at least ameliorate the substantial burden of

compounded interest. At any such hearing, this court should direct the superior court to appoint counsel for Babine to assist him in developing a record and litigating his ability to pay.

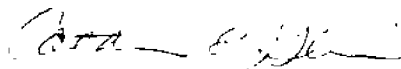
If the State is able to overcome the presumption of continued indigence and support a finding that Babine has the ability to pay, this court could then fairly exercise its discretion to impose all or a portion of the State's requested costs, depending on his actual and documented ability to pay.

D. CONCLUSION

The State presented insufficient evidence to support Babine's conviction, and the charge must be dismissed. Moreover, this Court should exercise its discretion not to impose appellate costs should the State substantially prevail on appeal.

DATED May 9, 2016.

Respectfully submitted,



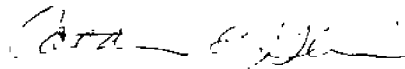
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Certification of Service by Mail

Today I caused to be mailed a copy of the Brief of Appellant in
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Edward Babine, Jr.
2108 11th Street #B
Bremerton, WA 98312

I certify under penalty of perjury of the laws of the State of Washington
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Catherine E. Glinski
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May 9, 2016

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